THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Public Service Commission Docket Nos. 2018-319-E & 2018-318-E

Duke Energy Carolinas, LLC .... Appellant-Respondent,

v.

The South Carolina Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., the South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc. .... Respondents,

of whom,

South Carolina Energy Users Committee is .... Respondent-Appellant.

Duke Energy Progress, LLC .... Appellant,

v.

The South Carolina Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc., · Respondents.

INITIAL REPLY BRIEF OF DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC

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The South Carolina Office of Regulatory Staff ("ORS") spends much of its brief on the coal ash spill at the Duke Energy Carolinas, LLC ("DEC") Dan River steam station located in North Carolina in 2014. DEC does not dispute that its customers should not pay to remedy the harm caused by that spill. To that end, DEC has not sought to recover from South Carolina customers any costs related to the Dan River spill or any criminal penalties imposed as a result of that spill. (DEC Tr. 655-22:9-10, 1228:25-1229:5, 1232-9 n. 2, 1304:8-25, DEC Application at ¶ 21, DEP Tr. 320-20:20-22, 840:6-16, 850-9 n.2, 869:10-24, DEP Application at ¶ 21, R. at ____). These rate cases, however, are not about the Dan River spill, but are rather about the ability of DEC and Duke Energy Progress, LLC ("DEP") (collectively, the "Duke Entities" or the "Companies") to recover certain reasonable and prudently incurred expenses required to continue to operate a joint system in North Carolina and South Carolina for the benefit of their customers and to comply with federal and state environmental laws applicable to the Companies' generation in both states.

I. The coal ash in question was generated over the course of many years to provide inexpensive power to the Companies' customers in North Carolina and South Carolina. Now that both states have required the remediation of that coal ash, the customers of both states should similarly share in those remediation costs.

As set forth in their appellants' brief, the Companies have allocated costs between North Carolina and South Carolina customers for decades, including the costs of constructing coal generating plants, purchasing coal, burning coal, and disposing of Coal Combustion Residuals ("CCR" or "coal ash"). (*See* DEC Tr. 647-7:6-19, 1242-9:10-1242-13:8, DEP Tr. 830:17-831:8, 837-11:22-837-12:3, 837-13:10-23, 839-8:4-13, R. at ____). The Companies' South Carolina customers pay a relatively small allocated portion of these total costs, approximately 10% of the

DEP costs and approximately 24% of the DEC costs.[1] (DEC Tr. 1321:8-11, DEP Ex. 14 at Bateman Ex. 4 at 6, R. at ____). The majority of the Companies' coal generating resources are located in North Carolina (seven of eight sites for DEP and seven of eight sites for DEC). (*See* DEC Ex. 29 at Kerin Exs. 3-5, DEP Ex. 39 at Kerin Exs. 3-5, R. at ____). As a result, North Carolina suffered the vast majority of the environmental impacts of the air and water pollution generated by the burning of coal and the CCR impacts. (DEP Tr. 1180:5-1184:7, R. at ____). ORS's policy witness testified to the benefits of the Companies' systems and the interconnectedness of the waterways of North Carolina and South Carolina, as follows:

> Q Okay. Now, these prudent and reasonable costs associated with CAMA compliance are associated with plants -- coal burning plants, some of which have been in service for decades -- 40 to 70 years, right?
>
> A (SEAMAN-HUYNH) Yes.
>
> Q And those coal burning plants have provided three separate benefits to South Carolina during their operating life, haven't they? Number one, the electricity?
>
> A (SEAMAN-HUYNH) Yes.
>
> Q Number two, by building those plants in North Carolina, South Carolina didn't have its air quality impacted, its water quality impacted, land cleared, ash ponds built and filled up? South Carolina avoided having any of that impact to its environment by the plants being located in North Carolina, did they not?
>
> A (SEAMAN-HUYNH) There are plants in North Carolina that do have an effect on the water in the river and the streams in South Carolina, so I would disagree with that statement.
>
> Q Well, the environmental impact of building and operating a coal plant in North Carolina is much greater than the impact if it were located in South Carolina? I mean -- oh, I said that in reverse. The environmental impact of a coal plant located

[1] ORS's brief refers only to the total costs system-wide rather than the much smaller South Carolina retail allocated share. ORS further fails to mention that the North Carolina Utilities Commission ("NCUC") has allowed the Companies to recover the North Carolina retail allocated shares of the remediation costs for the South Carolina sites. (DEC Tr. 1247-10:5-9, Ex. 34, DEP Tr. 839-10:7-11, Ex. 60, R.at ____).

in North Carolina is much less than the impact it would be if that same plant was located in South Carolina from an environmental impact to South Carolina? . . .

Q: The fact that these coal plants that are subject to CAMA, whose costs you do not want allocated to South Carolina, the fact they were located in North Carolina, the environmental impact -- the vast majority of the environmental impact associated with building and operating a coal plant has been burdened on North Carolina, but South Carolina has been able to enjoy the electricity they produce, right?

A (SEAMAN-HUYNH) For the most part, yes.

Q Well, at the most part, they didn't get the ash ponds that we're now trying to -- having to remediate? South Carolina avoided having the ash ponds because they were located in North Carolina where the plants are?

A (SEAMAN-HUYNH) I would say yes to that.

Q … The third aspect of this for DEP and the benefit to South Carolina from these plants being located in North Carolina is CP&L, Progress Energy, DEP plans their system to serve both North Carolina and South Carolina in the aggregate, do they not?

A (SEAMAN-HUYNH) They do.

Q: And, by having that larger footprint and more customers, they enjoy economies of scale and scope in just about every arena, whether it's dispatching plants or buying coal or arranging for freight. Isn't there a benefit to that?

A (SEAMAN-HUYNH) Yes.

(DEP Tr. 1180:5-1183:6, R. at ____).

The idea that major remediation activity needed to occur in coal ash basins was not new with the Dan River spill. Since the 1980s, the Environmental Protection Agency ("EPA") has been studying CCR management. Linda Luther, *Managing Coal Combustion Waste (CCW): Issues with Disposal and Use,* Congressional Research Service 7-5700, R40544, at 12-13 (2010). In 2009, the EPA initiated a CCR Assessment program following a spill by the Tennessee Valley Authority in 2008 in which more than one billion gallons of coal ash slurry was released. Then, in 2010, the federal government proposed a CCR Rule, which was finalized in 2015. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302, 21303 (April 17, 2015) (codified at 40 C.F.R. pts. 257 & 261) ("CCR Rule"). The CCR Rule was intended as a set of minimum standards and states were encouraged to adopt plans at least as stringent as the CCR Rule.[2] *Id.* Thus, the CCR Rule is a floor, not a ceiling.

It is true that North Carolina passed the North Carolina Coal Ash Management Act of 2014 ("CAMA") and imposed requirements that may have differed from the CCR Rule. No one, however, alleges that the passage of CAMA was an unreasonable exercise of power or some form of punishment or fine against DEC for the Dan River spill. If so, CAMA would be an unconstitutional bill of attainder in violation of U.S. Const. art. I, § 9, cl. 3.

ORS fails to mention that the South Carolina remediation efforts made pursuant to consent agreements with the Department of Health and Environmental Control ("DHEC") contain similar measures to those required under CAMA. (DEC Tr. 1232-8:9-10, DEP Tr. 850-8:7-8, R. at ____). In some respects, the requirements in South Carolina are more onerous. (*See* DEC Tr. 1266:2-6, DEP Tr. 839-14:13-23, R. at ____). Unlike CAMA, all of the DHEC consent agreements require the expensive remedial step of removing all coal ash from its existing location and disposing of it in lined landfills. As described by the uncontradicted testimony of the Companies' witness Dr. Julius Wright, "in South Carolina, as I already mentioned, there is a preference shown because of the settlements in this state to excavate every single unlined coal ash pond in the state, which also goes beyond the CAMA or CCR." (DEC Tr. 1303:3-7, R. at __).

[2] In discussing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the United States Supreme Court recently reiterated the idea that federal environmental laws are not "paternalistic central planning" but instead reflect the "spirit of cooperative federalism." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1356 (2020).

Nor does ORS mention that the Companies entered the DHEC consent agreements only after DHEC reached similar agreements with the other electric generating entities in South Carolina at the time. (DEC Tr. 1232-7:21-1232-8:4, DEP Tr. 839-14:13-23, 850-7:21-850-8:2, R. at ____). By entering into similar agreements with all generators of CCR in South Carolina, DHEC, the state's environmental policy maker, established a policy in favor of excavation that is more stringent than the CCR Rule. In addition, the Companies' costs incurred pursuant to these agreements were approved by the Public Service Commission of South Carolina (the "PSC" or the "Commission") (DEC Order at 53 (disallowing only the CAMA attributable costs), DEP Order at 43, 51-52; R at. ____), as the state's utility rate policy maker. *See Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984). ORS also fails to mention that North Carolina does not have an equivalent process to the DHEC consent agreements, and therefore, implemented similar requirements by way of statute that apply to all generators of CCR, not just DEC. These requirements in North Carolina and South Carolina are consistent with requirements across the Southeast. (DEC Tr. 1247-11:12-1247-13:12, DEP Tr. 839-12:13-839-14:12, R. at ____).

To be clear, if the North Carolina sites were instead located in South Carolina, the same costs, or more, would have been incurred by the Companies and would have been approved by the PSC. Instead, the PSC disallowed these costs based on a policy determination that South Carolina customers should not be responsible for any costs incurred due to CAMA that it has deemed to be above the floor set by the CCR Rule, even though those costs and the remediation required under CAMA are similar to the costs incurred in South Carolina under the DHEC consent agreements. There has been no finding or argument that these costs were unreasonable or imprudent.

As previously argued by the Companies in section I(A) of their appellants' brief, the record reflects that the disallowance of these costs will prevent the Companies from earning a reasonable rate of return as required by *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923). (DEC Application at ¶¶ 22-24, DEP Application at ¶¶ 22-24, DEC Tr. 647-7:6-8, R. at ____). Contrary to ORS's argument, utilities have a protected interest in rates which will provide "a reasonable return on the value of the property used by a utility company to furnish its service to the public[.]" *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 131 (D.C. 1977); *see Bluefield*, 262 U.S. at 690 ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."). Here, the Commission wrongly disallowed the South Carolina allocated share of more than $800 million in system costs. As a result, the rate base was artificially low, and in turn, the amount on which the Companies can seek a return is too low. *See S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n of S.C.*, 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978).

A. The Companies' position as to CCR costs is consistent with basic cost causation principles and traditional cost allocation between North Carolina and South Carolina. The Commission's orders disregard those basic principles to punish the Companies for DEC's Dan River spill.

With those clarifications made, the Companies now turn to the issue of assignment and allocation of what have been deemed "CAMA costs" between North Carolina and South Carolina, which is the only ratemaking issue in dispute regarding the requested CCR remediation costs. No party has argued that it was not prudent for the Companies to comply with North Carolina law or that the costs DEC and DEP incurred in complying with CAMA are not reasonable.

The basis for the Commission's decision cannot be punishment of DEC and DEP because it is beyond the purview of the PSC to punish the Companies for DEC's Dan River spill. *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 463-64, 832 S.E.2d 572, 575 (2019) (reversing PSC decision for applying a retaliatory standard on remand and clarifying that the PSC "should evaluate the evidence in accordance with objective and consistent standards"). DEC has accepted the consequences of its actions and has paid heavily for them. It is instead the PSC's job to set just and reasonable rates. S.C. Code Ann. § 58-27-810. With respect to these costs, the sole matter before the Commission and now before this Court is whether the PSC can disallow recovery of a portion of DEC's and DEP's reasonable and prudent generating costs solely because those costs were incurred to comply with a North Carolina law.

The Companies routinely allocate system costs even where those costs may be higher in one state than the other by operation of state law. As explained by Dr. Wright:

> Some state specific costs that are often shared between the states include property taxes, on generation and transmission assets, differences in everyday operating costs like employee expenses, contractor expenses, fuel costs, and even costs like fuel transportation, which can differ depending on the location of a generating station (for example, rail service from coal mines to North Carolina can be different, and usually cheaper because of distance, than rail service to South Carolina). In addition, it is my understanding that, in this case, the Company is proposing to return to South Carolina customers $87 million of excess deferred income taxes resulting from a decrease in the North Carolina state income tax rate. This decrease in the income tax rate is the result of North Carolina legislation. If it is the ORS's position that South Carolina customers should not pay for any costs due to North Carolina legislation, then they should also propose that South Carolina customers not receive any benefits due solely to North Carolina legislation, and remove the $87 million refund of North Carolina state income taxes from the case.

(DEC Tr. 1247-7:4-18, DEP Tr. 839-5:17-839-8:13 (similar), R. at ____). This extends to environmental compliance costs. (DEC Tr. 1247-7:19-1747-10:9, DEP Tr. 839-8:1-13, R. at ____). Such cost sharing is common for multi-state systems. (*Id.*, DEP Tr. 839-8:14-839-9:17, R. at ____).

The CCR remediation costs are system costs incurred to maintain the Companies' generation systems in North Carolina and South Carolina. As a result, those costs are presumed "to benefit the entire system." *N. Virginia Elec. Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 945 F.3d 1201, 1207 (D.C. Cir. 2019). ORS relies on the limited exception provided in *N. Virginia Elec. Coop., Inc.* where the citizens of one state uniquely caused and benefitted from the cosmetic undergrounding of certain lines in one state. *Id.* That is not the case here, because the cause for the expense is the system-wide burning of coal for the generation of power consumed in both states. North Carolinians and South Carolinians benefitted for generations from the burning of that coal, and the remediation should be a system expense as well. Thus, the cause and the benefit of burning the coal accrued to both states, and the cost of the remediation should similarly be borne by customers in both states.

The power generation and remediation cannot be divorced; otherwise, South Carolina customers would get all of the benefit of the power generated in North Carolina and the economies of scale of that larger system without contributing their fair share for the later closure or remediation costs of that system. Further, ORS and the Commission's orders compound these issues by not requiring direct assignment of the South Carolina remediation costs over which North Carolina customers and the NCUC had no influence. This notion of having one's cake and eating it too is not permitted in rate setting. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) ("The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.").

As quoted above, ORS conceded that South Carolina benefits from the joint system and remediation efforts. In response to the general ORS policy position that these costs should be directly assigned to North Carolina, the Companies presented testimony that the coal ash located in North Carolina "was produced in providing electric service to customers in both South Carolina and North Carolina. There is no dispute that South Carolinians benefitted from the low electric rates and reliable service this Company has provided for decades, in large part due to its coal-fired electric generation." (DEC Tr. 1247-21:20-23, DEP Tr. 839-24:20-23, R. at ____). Moreover, the Companies did not seek to recover all of their CAMA related costs. Instead, the Companies directly assigned several components of their CAMA compliance costs to North Carolina. (DEC Tr. 1232-37:1-9, DEP Tr. 850-37:3-11, R. at ____). However, the bulk of the CCR remediation expenses are system expenses and should not be directly assigned.[3]

ORS relies heavily on the fact that under the North Carolina Clean Smokestacks Act, certain costs caused by compliance with that legislation were recovered only from the Companies' North Carolina customers. A closer look at that act shows why it is not only distinguishable from CAMA, but that it supports recovery of coal ash remediation costs on a system basis. The Clean Smokestacks Act, adopted by the North Carolina legislature in 2002, included the following inter-related provisions: (1) freezing the North Carolina rates of investor-owned utilities ("IOUs") from 2002 through 2007 (N.C.G.S. § 62-133.6(e)); (2) requiring dramatic reductions in air pollution emitted by IOU owned electricity generating facilities located in North Carolina (N.C.G.S. § 143-

[3] The Companies object to the material cited in Footnote 9 of ORS's brief because it does not appear in the record in this case and is therefore inappropriate under Rule 210(c), SCACR.

215.107); and (3) including a comprehensive cost recovery provision that allowed IOUs to recover the costs of the air pollution reduction measures that were being required by the Clean Smokestacks Act. The cost recovery was accomplished by allowing for the accelerated amortization of IOU investments in the required air pollution measures. N.C.G.S. § 62-133.6.

Thus, the Clean Smokestacks Act costs that the Companies incurred and recovered exclusively in their North Carolina rates were the result of a complex, multi-faceted legislative enactment by the North Carolina General Assembly that froze North Carolina rates, implemented new North Carolina-specific environmental requirements, and set forth a method for the recovery of the costs associated with those investments. Given the act's express terms, these costs were directly assigned to North Carolina and were not recovered from South Carolina customers.

In contrast, CAMA followed the CCR Rule and the lead of other states in addressing the remediation of existing coal ash impoundments. CAMA is consistent with the DHEC consent agreements, and the actions required of the Companies were similar in both states. Unlike the forward-looking costs required by the Clean Smokestacks Act, CAMA addressed costs caused by decades of operating coal-fired generating units, operations which had generated millions of kilowatt hours of inexpensive electricity for customers in North Carolina and South Carolina. CAMA did not address IOU rates or cost recovery, and as a result, traditional principles of cost-causation require that any costs caused by CAMA requirements are recoverable on a system basis from the customers who benefited from the burning of the coal that produced the coal ash.

This distinction is also illustrated by the South Carolina Distributed Energy Resource Act (S.C. Code Ann. §§ 58-39-110 to -150, "SC DER Act"). There, the South Carolina General Assembly imposed new requirements on IOUs intended to encourage the development and deployment of alternative energy resources, especially solar generation resources. The SC DER

Act recognized that the measures being required of IOUs would result in additional "incremental costs" over and above the IOUs' avoided costs.[4] The SC DER Act includes special provisions to allow for the recovery of those incremental costs that were being required to meet the alternative energy goals of the legislation from South Carolina customers only. S.C. Code Ann. § 58-39-140. Like the North Carolina Clean Smokestacks Act, the South Carolina General Assembly in enacting the SC DER Act contemplated that its distributed energy requirements would impose new forward-looking costs on IOUs, and it provided a mechanism for the recovery of those costs from South Carolina customers.

The costs caused by the Clean Smokestacks Act and the SC DER Act are fundamentally different from the remedial costs required by CAMA. In addition to the facts discussed above that CAMA costs were a direct result of the past burning of coal for the benefit of customers in both states, the remediation costs associated with CAMA are similar to or less than the costs of the Companies and other South Carolina utilities in complying with the DHEC consent agreements. Thus, compliance with CAMA did not require the type of incremental costs required by the Clean Smokestacks Act or the SC DER Act.

The Commission erred in making a unilateral policy decision that any costs attributable to CAMA would not be recoverable. When the issue is properly framed and considered, all of ORS's legal arguments are irrelevant. The costs in question were incurred on a system-wide basis, and were incurred for the benefit of all of the Companies' customers. The remediation measures taken were similar in North Carolina and South Carolina, and the Companies sought recovery on a

[4] "Avoided cost" is a regulatory term generally used to describe an IOU's cost to produce energy. In the SC DER Act, the term is used to describe the cost to the IOU to produce electricity "but for" the additional costs of complying with the requirements of the Act, referred to as "incremental costs."

system-wide basis of the bulk of these expenses in both jurisdictions, regardless of where the costs were incurred. The costs in question are prudent and reasonable, and there is no testimony to the contrary. Thus, the Commission erred in disallowing the South Carolina retail share of these costs.

South Carolina must consider the consequences of taking the position that South Carolina customers should not be required to pay their pro rata share of system costs the Companies incur to comply with North Carolina laws. When the "shoe is on the other foot" does South Carolina want to be responsible for the full bill rather than its much smaller allocated share? Such a policy reduces the value of the system for customers in both states and would likely result in increased costs and increased rates.

B. The authorities cited by ORS establish a violation of the Dormant Commerce Clause.

ORS argues in section III of its brief that the Commission's orders "regulate evenhandedly to protect a legitimate public interest" and therefore do not violate the Commerce Clause. This argument ignores the uncontroverted facts and is contrary to the authorities cited by ORS.

In discussing this issue, ORS concedes the legal principles upon which the Companies rely to show the violation of their rights:

> • "regulatory measures [may not be] designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008);
>
> • to avoid violating the Dormant Commerce Clause, the law must "regulate[] evenhandedly with only 'incidental' effects on interstate commerce[.]" *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 99 (1994);
>
> • "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); and
>
> • even an evenhanded regulation with only incidental effect on interstate commerce will nonetheless be struck down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Application of these principles to the uncontested facts here establish a clear violation of the Dormant Commerce Clause, notwithstanding the protestations of ORS to the contrary.

First, the Commission's orders do not "regulate evenhandedly."[5] The Companies are prohibited from recovering the full South Carolina retail allocated share of their coal ash compliance costs in rates because a portion of those costs is imposed pursuant to North Carolina law, while a South Carolina utility may recover all of its compliance costs.

Second, South Carolina ratepayers do not pay their share of compliance costs imposed by North Carolina law, although North Carolina ratepayers are paying for their share of all compliance costs, including those incurred under the DHEC consent agreements. Thus, the Orders "benefit in-state economic interests by burdening out-of-state competitors."

Third, the orders "discriminate against interstate commerce" because the prejudice to the Companies results entirely from the fact that they operate across state lines and are engaged in interstate commerce. The effect of this discrimination is not "incidental." The Companies have been denied the ability to recover the South Carolina retail allocated share of $800 million in reasonable and prudent costs only because they operate in interstate commerce. As discussed above, had these costs been wholly incurred in South Carolina, they would have been fully recoverable.

Fourth, there is no "local benefit" or "legitimate public interest" that would outweigh the unlawful burden on interstate commerce. ORS's argument in section III that the Commission acted to "ensure that South Carolina customers do not pay unreasonable costs they neither caused nor from which they derive any benefit" is contrary to the record. It is undisputed that the

[5] Contrary to ORS's argument in its brief in section III, a Dormant Commerce Clause challenge may be made to a rate setting order of the Commission because the Commission is acting pursuant to legislative authority delegated to it by the General Assembly, as ORS concedes in footnote 34.

Companies' customers benefitted from low rates over a period of many years from the low-cost production of electricity using coal-fired generating plants. For ORS to assert that there was no benefit related to the cost to remediate the resulting CCR ignores reality and the record. Moreover, there is no allegation or finding that any of the coal ash compliance costs for which recovery is sought is not reasonable or prudent.

Thus, the disallowance of CAMA costs did not further any local interest other than sheer economic protectionism. This is especially clear in light of the Commission's allowance of similar costs arising from the DHEC consent agreements. The Commission's approval of the recovery of these costs from South Carolina ratepayers, but not those resulting from CAMA, demonstrates that the objection is not related to the nature of the expense, but instead is based on its geographical source. Such discrimination is not only a violation of the Commerce Clause, but also will likely harm South Carolina ratepayers in the long term. If the NCUC adopts a similar protectionist approach to cost recovery, South Carolina ratepayers will lose the benefit of the cost sharing they presently enjoy, which will increase their rates and offset any short-term putative benefit.

The Commission's orders discriminate against interstate commerce, unfairly prejudice the Companies because they operate across state lines, do not promote any legitimate local interest, represent rank economic protectionism, and will likely harm, rather than benefit in-state interests in the long run. They must be reversed on this ground alone.[6]

[6] This issue is properly preserved for appeal. "To preserve an issue for appellate review, an appellant must object at his first opportunity." *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). In this case, this issue was not ripe until the Commission ruled, revealing the violation of the Commerce Clause for the first time. Under these circumstances, raising the issue in a petition for rehearing or reconsideration is sufficient to preserve it. *Id; see also MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374–75, 588 S.E.2d 639, 641 (Ct. App. 2003) (holding issue of whether court used the proper standard could be raised in a motion for reconsideration).

II. Wittliff's testimony failed to rise above the level of surmise, speculation, and conjecture and was riddled with errors.

In addition, ORS repeatedly refers to "the thorough and well-reasoned analysis" of Dan Wittliff as its sole source for identifying the costs it claimed were attributable to CAMA without addressing the glaring problems with Wittliff's testimony. As a threshold matter, Wittliff admitted, "[d]etermining with great precision the CCR cost increases above and beyond what the federal CCR rules require based on the limited information I received during 12 rounds of discovery— I mean it was a lot of information; it just missed the mark in some cases— is a bit like performing brain surgery with a pick ax." (DEC Tr. 1336:17-24, R. at ____). Thus, his testimony does not rise beyond the level of "surmise, speculation or conjecture" and the Commission's order on this point should be reversed as a matter of law. *See Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 317, 803 S.E.2d 280, 286 (2017) ("Moreover, if . . . the Commission's findings 'are based on surmise, speculation or conjecture, then the issue becomes one of law for the court....' *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968)").

As described more fully in section I(c) of the Companies' appellants' brief, Wittliff's determination of which remediation costs were attributable to CAMA is riddled with errors. ORS has not responded at all to the most glaring of these mistakes: (1) Wittliff's failure to perform engineering analyses and failure to address the specific work undertaken by the Companies (*see* DEC Tr. 1364:21-1365:4, DEP Tr. 1117-8:3-18 (admitting he applied "surrogate cost estimates"), 1139:18-1142:8, R. at ____), and (2) Wittliff's failure to use the correct test year data for DEP as illustrated below:

Plant	Amount Requested by DEP (Kerin Revised Ex. 10, R. at ____)	Amount Requested as Presented by ORS and in Order (Wittliff Table 5.4; Order at 43, R. at ____)	Disallowance (Wittliff Table 5.4; Order at 43, 52, R. at ____)
Asheville	120,246,520	191,934,196	98,220,932
Cape Fear	22,025,869	33,631,199	33,631,199
HF Lee	42,214,672	54,775,180	9,207,711
Mayo	13,741,179	25,384,168	---
Robinson	6,850,071	11,431,675	---
Roxboro	19,663,922	34,070,691	---
Sutton	187,736,005	255,525,554	186,376,226
Weatherspoon	21,656,193	28,287,429	6,044,240
Total:	**434,134,431**	**635,040,092**	**333,480,308**

ORS instead makes the conclusory statement in section II of its brief that "Mr. Wittliff's results are reasonable, well-documented in the record, and are summarized in the table included in the Statement of Facts." As shown in the above table, the final numbers presented by DEP differed by approximately $200 million on a system basis and as to every location considered by Wittliff and adopted by the Commission. For example, the Commission disallowed eleven million dollars above what was requested for the Cape Fear plant (disallowing $33,631,199 when DEP only sought $22,025,869). There was no attempt made by either ORS or the Commission to reconcile Wittliff's testimony with the actual expenses DEP sought to recover. Instead, the use of this table shows the Commission did not evaluate the evidence, but instead rubber stamped the clearly erroneous determination of ORS's witness Wittliff.

As far as the areas where ORS attempted to respond in its brief, it has not explained the reasons for the numerous deficiencies inherent in Wittliff's own testimony as pointed out by the Companies at the hearing, in their motion to reconsider, and in their appellants' brief. As discussed in section I(c) of the Companies' appellants' brief, there are errors as to every site for which Wittliff recommended disallowances. Wittliff admitted many of these errors on cross-examination. For example, he conceded that he used the wrong closure date in recommending disallowance of $116,669,019 based on an accelerated closure deadline at Dan River. (DEC Tr. 1360:20-24, R. at ____). Undeterred by these errors, ORS argues that Wittliff's testimony should simply be accepted, regardless of its facial deficiencies and those revealed on cross-examination.

As a result of the errors that plague Wittliff's opinions and conclusions, his testimony regarding the amount of any disallowance does not stand as reliable, probative and substantial evidence. For these reasons, the Commission's determinations as to the amount of the disallowance for CCR remediation costs deemed attributable to CAMA is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" and should be reversed pursuant to S.C. Code Ann. § 1-23-380.

III. With respect to the litigation costs for which the Companies sought recovery, the Companies responded to the discovery requests issued by ORS. ORS then complained at the hearing that the Companies had not met their burden because they had not produced materials that ORS had not requested.

ORS made the following discovery requests:

> 55-1 Please identify all litigation expenses contained in the Company's response to Utility Rates Request #26 that are related to Coal Ash.
>
> 55-2 Of those coal ash litigation expenses identified, please identify what account they are booked to, and the SC retail portion that was included in the Company's Application for recovery in rates in this docket.
>
> 55-3 How do the codes RC 8987 and RC 8749 relate to the document and information presented?
>
> 55-4 Could you please elaborate on the "potential insurance recovery for coal ash" included in the explanations for legal expenditures?
>
> 55-5 Please provide invoices for all coal ash litigation expenses that the Company has requested recovery for. We do realize that it may take some additional time to produce the invoices, so provide these as they become available.

(DEC Exs. 47, 49, DEP Exs. 67, 71, R. at ____). The Companies responded to those requests. (*Id.*). At the hearing (DEC Tr. 1722:11-1726:16, R. at ____), however, ORS announced that the Companies failed to meet their burden because they had not produced entirely different documents (that ORS had not requested), including matter descriptions, factual inquiries, case summaries, and contracts, and had not provided additional details beyond what ORS requested.[7] Ironically, ORS simultaneously contends in section IV of its brief that the records the Companies presented as a late-filed exhibit after ORS raised this issue at the hearing were a document dump that was also insufficient to meet the Companies' burden.

This kind of "gotcha" litigation is not permitted as part of the PSC process. *See* S.C. Code Ann. § 58-4-55(C) (describing discovery process before the Commission and providing ORS with ability to compel responses); PSC Order 2018-708 in Docket No. 2018-2-E (2018) ("ORS complains that, 'SCE&G failed to cooperate by providing complete and reliable data in a timely manner and, therefore, had the ability to dictate the extent to which other parties could present their cases.' Various discovery devices are available to enable a party to gather information to prepare and present evidence in our proceedings. If there were a discovery dispute, the proper mechanism to require a party to provide properly discoverable information is a motion to compel. No party moved to compel discovery in this proceeding." (footnote omitted)); *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 460–61, 832 S.E.2d 572, 573 (2019). Under this Court's precedent, the Companies should have been given "an ample opportunity to explain [their] expenditures and justify them." *Hilton Head Plantation Utilities, Inc. v. Pub. Serv. Comm'n of S.C.*, 312 S.C. 448, 451–52, 441 S.E.2d 321, 323 (1994). That did not happen. ORS has attempted to frame this as a case of a limited and incomplete record.

[7] This issue is preserved. The Companies raised it through the cross-examination of ORS witness Steve Hamm, and the Commission ruled against them. (DEC Tr. at 1716:9-1743:3, R. at ____). No further action was required to preserve this argument. *See Eubank v. Eubank*, 347 S.C. 367, 375 n.5, 555 S.E.2d 413, 417 n.5 (Ct. App. 2001) ("Husband raised this issue in his answer and at the hearing and the trial judge ruled against him. Thus, no Rule 59(e), SCRCP, motion was necessary to preserve the issue.").

If ORS felt it lacked sufficient information on this point, it is only because ORS failed to seek additional information. The Companies should not be penalized for that failure.

IV. ORS incorrectly asserts that the Commission's orders provide for the recovery of all deferred costs. Instead, the Commission's orders fail to make any provision for the costs attributable to the time value of money inherent in any deferral as these costs have already been paid by the Companies and will only be recovered from their customers over the course of years.

There is not a dispute about whether the underlying expenses here were reasonably and prudently incurred, nor is there any dispute that the expenses should be deferred over some period of time.[8] The only issue before this Court is whether the Companies are entitled to a return on those deferred expenses, regardless of the nature of the underlying expense. In denying a return on those expenses it classified as attributable to operations and maintenance ("O&M"), the Commission arbitrarily refused to allow the Companies the constitutionally required full recovery of their reasonable and prudent costs. Accordingly, the Companies contend that the Commission committed an error of law.

ORS repeatedly argues that the Commission's orders provide for the recovery of all of the Companies' approved deferred costs. However, this argument ignores the reality that the Companies have incurred financing costs for which they are not being compensated. There is a time value to money (financing cost) for funds advanced to customers that spans from the time the deferred dollars were spent until they are fully recovered. (*See* DEP Tr. 889:3-890:25, R. at ___). ORS's argument and the Commission's orders fail to recognize that time value of money and in effect "suggest a business can borrow money for free. However, investors do not provide interest free loans." (DEC Tr. 659-10:4-6, DEP Tr. 326-10:6-8, R. at ____). The Companies are entitled

[8] For this reason, ORS's arguments in section V of its brief relating to reasonableness are misplaced.

to recover the full value of those approved deferred costs, which must include a return on costs during the deferral period and amortization period. As explained by the Companies' witness Robert Hevert:

> The Company proposes to include operating-related deferred costs such as operation and maintenance and property taxes in rate base to earn a fair return at the Company's weighted average cost of capital, which would only make it whole on an economic basis. Because the expenditures required actual cash outflows, the Company has incurred financing costs for these deferred costs. If it is not authorized to include these costs in rate base and earn a return on them, the Company will suffer a negative net present value, which would be borne by investors.

(DEC Tr. 1790-95:16-1790-96:7, DEP Tr. 948-95:8-15R. at ____).

None of those costs have previously been brought into rates or paid for by customers. All of these costs have been funded by investors (both debt and equity). Because the costs are wholly financed by the Companies and their investors, the Companies' financing costs during the deferral period are legitimately incurred and recoverable. The same principle applies during the amortization period. Companies' witness Kodwo Ghartey-Tagoe summarized this issue as follows:

> ORS does not raise any imprudence allegations regarding the Company's actions relative to expenses included in deferred balances; it simply ignores that the timeliness of cost recovery matters and that the Company must finance the deferred balances. The ORS proposes stretching out certain deferred costs over extended periods of time without recognizing the costs to finance the balances during that period. Although we are generally not in dispute over the underlying actions which resulted in the deferred balances, ORS takes a drastic position on the return on those balances during the deferral period and amortization periods to somehow suggest that the Company is profiting from delayed recovery of costs. This is not the case. The Company is trying to recover its carrying costs on the value of money based upon our financing structure. The Company's financing is made up of both debt and equity, and to ignore the way the Company finances its costs will cause grave concern to investors as articulated by Company Witness Hevert. It would also, depart from good regulatory practice as explained by Company Witness Dr. Wright, and have other negative implications as explained by Company Witness Smith. I also see a contradiction in ORS's position, because at the same time the ORS proposes to effectively disallow deferred costs (without any allegation of

> imprudence), the ORS cost of equity witness relies upon the deferrals to arbitrarily attempt to lower the Company's cost of capital. It is a contradiction to rely upon those deferrals in one witness's recommendation, but then cut them in another.

(DEC Tr. 647-12:3-23, DEP Tr. 300-10:15-300-11:14 (similar), R. at ____).

ORS is also incorrect that allowing a return on deferrals during the deferral period and amortization period allows the Companies a double recovery or somehow results in a windfall. This is not the case. The return earned by the Companies during the deferral and amortization periods is the cost of capital necessary to compensate and make the Companies whole for the funds advanced to their customers at the time they were spent. ORS and the Commission's orders penalize the Companies by not permitting them to recover fully their deferred costs while also citing the allowance of deferrals as a rationale for reducing the Companies' allowed cost of equity. (*Id.*; *see* DEC Tr. 1491:5-14, R. at ____ (contradiction noted by SCEUC witness Kevin O'Donnell)).

If the Companies had sought to recover these costs in the ordinary course, ORS and the Commission are correct that operating expenses are recovered on an annual basis as a component of ongoing rates and are not entitled to a return. However, ORS and the Commission's orders fundamentally miss that O&M costs are recovered annually as they reoccur, but capital costs reflect funds previously invested by the Company that are recovered over a period of years. This misunderstanding is illustrated by the following testimony:

> Q You're throwing these other costs in, and you want to get a return on that. You don't get a return on the O&M costs during the test year, do you?
>
> A [K. SMITH] It's — we're not — well, let me go back. So, a deferral is one mechanism in a wide range of mechanisms for a commission to allow a company to earn its operating expenses plus a reasonable return for its investors. Yes, we do use a test year, which we do update. But in — so, but the deferral helps us — and we do delay rate cases with regard to deferrals....

> But when you have a historical test period that's only adjusted for a certain amount, you can only adjust it a certain amount, then there are costs, since we are not recovering it from our customers, and we think they're prudent costs to incur at that time, then the investors advance us that money. So it's not as much the fact that those costs are not in our test year; it's just investors have advanced us cash, and we are asking for a return on the cash that the investors have invested in the company…
>
> …Q But ORS isn't contesting the fact that you're entitled to the amount in those deferrals, again, are we? We're only contesting whether or not you're entitled to a return to your investors on those deferrals, correct?
>
> A [K. SMITH] Okay. But let's look at it this way: It's like when you go to the bank. You go to the bank; you're going to build a new building for your business.... So you go to the bank and you're like, "Oh, I need to borrow some money on a construction loan; I'm going to build a new store, some inventory, et cetera, hire employees. I would like you to loan me the money." So the bank lends him the money, and that is cash out the door. The bank is going to expect interest back, and they're going to expect that interest on that cash they advanced the business, no matter what the cash was used for. So we have financing costs, whether the cash was used for what you all term as operating expense or capital-related expense, but it's all cash out the door to the investors.
>
> Q And I agree with all of that, except Duke Energy Carolinas isn't a bank, is it? You're a public utility.
>
> A [K. SMITH] No, but we have investors, and they expect a reasonable return.

(DEC Tr. 716:5-718:18, R. at ____).

ORS and the Commission's orders ignore that O&M costs recorded as a regulatory asset are no longer O&M costs from a balance sheet perspective when they are deferred. Instead, they are an investment earmarked for recovery in the future over a period of years – the same as capital costs. By definition, the FERC Uniform System of Accounts – Account 182.3 (Other Regulatory Assets) provides in relevant part:

> (a) This account must include the amounts of **regulatory-created assets**, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definitions § 367.1(a)(38).)
>
> (b) The amounts included in this account are to be established by those charges **which would have been included in net income**, or accumulated other

> comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts **but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services**. . . .

(emphasis added) (codified at 18 C.F.R. pt. 101). When the costs are recorded as a regulatory asset, these paid costs become a debt to the Companies' shareholders, and a return during the deferral and amortization period is appropriate regardless of the underlying, original nature of the costs.

Moreover, denying timely recovery of the costs through extended amortization periods (in the most egregious cases, 30 to 39 years with no return during the amortization period) exacerbates the issue and further diminishes the Companies' ability to be made whole. As explained by DEC witness Kim Smith, "[t]he ORS's logic is contradictory, as it does not support a return because the costs were not originally classified as capital, but then the ORS treats them like capital by proposing such lengthy amortization periods." (DEC. Tr. 650:6-13, R. at ____). Dr. Wright further explained how the extended amortization periods hinder the Companies from fully recovering prudent costs as follows:

> The most basic reason is it completely ignores the effect of inflation over time; and, this impact is aggravated by Mr. Payne's other recommendation to stretch out the Company's proposed cost recovery amortization periods, often by decades. Thus, Mr. Payne's recommendations not only ignore the fact that dollars the Company invests cost money, but he even ignores the impact of inflation on the recovery of those costs. In the most basic economic terms, if one ignores the impact of inflation and spreads over many future years the recovery of dollars spent today, this means the Company can never recover its true costs and never be made whole.

(DEC Tr. 1247-30:3-14, DEP Tr. 839-34:1-12, R. at ____).

ORS has no basis for its unprecedented recommendation.[9] In fact, its position is directly refuted by the few sources it cites. Of note, the essay quoted by ORS provides no dispositive support and cites authority that supports the Companies' argument. Scott Hempling, *What "Regulatory Compact"*? (March 2015), https://www.scotthemplinglaw.com/essays/what-regulatory-compact. The book quoted in that essay and cited by ORS states, "[a] regulatory asset is a deferred cost that is included in rate base, where it earns a rate of return." Jonathan Lesser and Leonardo Giacchino, *Fundamentals of Energy Regulation* 122 (2007).

This lack of any underlying basis for this position is further reflected in this testimony from ORS witness Payne:

> Q Okay. Was the ORS policy on separating capital and O&M for deferrals articulated in any statute or rule?

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[9] Only when ORS filed sur-rebuttal testimony, after the Companies had any meaningful chance to respond, did ORS attempt to support their position; however, none of the arguments raised by ORS provide any true ratemaking or accounting justification. ORS cited to the Governmental Accounting Standards Board Statement No. 62 when it admits that authority from the Financial Accounting Standards Board would be more appropriate. (*See* DEC Tr. 1705:2-1706:8, R. at ____). Other sources cited contradicted ORS's position. For example, the National Association of Utility Commissioners ("NARUC") Rate Case and Audit Manual states that regulatory assets and other deferrals should be examined to determine if the deferred costs are appropriate for rate base inclusion, but ORS clearly misunderstood the context - the manual says nothing about splitting the regulatory assets between deferred operating expenses and deferred capital costs. (DEC Tr. 659-9:3-659-10:6, R. at ____). After reading the ORS proposal, DEC witness Smith contacted Deloitte & Touche, the authors of the NARUC manual, to confirm there was no supporting accounting guidance. (DEC Tr. 1949:18-1950:10, R. at ____). In fact, the NARUC Manual supports the Companies' positions:

> A utility, in order to remain viable, must be given the opportunity to recover its prudently incurred total cost of providing electric service to its various classes of customers. Cost of service is usually defined to include **all of a utility's operating expenses plus a reasonable return on its investment devoted to the service of the ratepaying public.** Accordingly, it is incumbent on the utility to ensure that it's-- that the rates it charges for electric services **are sufficient to recover its total cost**.

(DEP. Tr. 1288:6-16, R. at ____ (emphasis added)). During the DEP hearing, ORS witness Zachary Payne admitted the "policy is a departure from the accounting standards, I guess." (DEP Tr. 1284:21-23, R. at ____).

> A (PAYNE) No. Due to the lack of statutes and rules, we came up with that policy to align how those deferred expenses would've been treated had they not been deferred expenses, had they been treated within a proper test year for a rate case.
>
> Q Okay. And so, it's a relatively new policy?
>
> A (PAYNE) You could say that, yes.
>
> Q Okay. All right. And it wasn't articulated at the time the Company requested the deferrals, correct?
>
> A (PAYNE) No. It was not.

(DEC Tr. 1710:3-15, R. at ____).

Therefore, the Commission was arbitrary and capricious in departing from prior practice and not allowing any return on deferred expenses that could be classified as O&M at the time they were incurred. Financing a deferred cost over decades with no return does not leave the utility whole and allow it to recover all of its reasonable and prudently incurred costs as required by *Hope* and *Bluefield*—instead, it is an interest free loan.

CONCLUSION

For these reasons and those presented in the Companies' appellants' brief, this Court should reverse and/or reverse and remand this matter for further review by the Commission such that the Companies can collect prudently incurred costs and charge just and reasonable rates as required by S.C. Code Ann. § 58-27-810 and under *Hope* and *Bluefield*.

Respectfully submitted,

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